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No. 91-840

In The

Supreme Court of the United States

October Term, 1991

MARY A. COLLINS,

Petitioner,

v.

BAPTIST MEMORIALS GERIATRIC CENTER and ODUS TAYLOR HENLEY,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, BAPTIST MEMORIALS GERIATRIC CENTER and ODUS TAYLOR HENLEY, respectfully request that this Court deny the Petition for Writ of Certiorari, which seeks review of the opinion of the United States Court of Appeals for the Fifth Circuit rendered in this proceeding on August 2, 1991, rehearing denied on August 29, 1991. That opinion is reported at 937 F.2d 190.

STATEMENT OF THE CASE

On March 21, 1988, Mary A. Collins, Personnel Director, was fired by Baptist Memorials Geriatric Center ("the Center"). She was fired by its Executive Director, Odus Taylor Henley ("Henley"). The Center is a large, multi-level retirement and medical care community for the care of retired and elderly persons, located in San Angelo, Texas. Henley was the top officer of the corporation and had presided as such since 1971. The Center has a total of 660 residents, over 300 employees, some 275 of whom are women. Mary A. Collins ("Collins") was hired as Personnel Director of the Center on February 17, 1986. Her employment with the Center was for no set term and was subject to termination without notice on the part of either Collins or the Center. At the time of trial, Collins had attended high school and subsequently obtained her G.E.D.; Collins was 43 years old and had no college degree, but had attended various management training seminars and court reporting schools. At the time of trial, Henley was 72 years old, possessed an undergraduate degree from Howard Payne University and a Divinity Degree from Southwest Baptist Seminary. He also received an Honorary Doctorate Degree from Howard Payne. A highly decorated World War II veteran, Henley served as a Baptist minister for twelve and a half years before joining the Center in 1962. Henley has been in the ministry continuously for 53 years. The Center's nursing home received a superior rating from the Department of Health in 1988, the same year as Collins' termination, which is the highest rating possible in the State of Texas. The Center is the largest center in any one location in the

entire Southern Baptist Convention. It serves all denominations and is a charity open to all persons regardless of their ability to pay.

Collins' starting salary of $16,120.00 as Personnel Director was the highest starting wage that any Personnel Director had received at the Center. After going to work at the Center, Collins worked closely with Mr. Vic Rhoads ("Rhoads"), the Executive Vice-President of the Center. In the course of time, it was assumed that Rhoads (age 39) would replace Henley as the Center's Executive Director. However, Rhoads was terminated at the Center in 1987, and Collins' and Henley's working relationship deteriorated thereafter. Collins developed a hostile attitude towards Henley and there were personality clashes between the two.

Collins received reprimands and warnings on February 15, 1988, and March 11, 1988, for approval and request for unauthorized salary advances to employees over a period of time and for assuming authority which had been specifically forbidden and reserved only to the Executive Director who was on duty or the Executive Vice-President. She received an additional reprimand for insubordination, specifically for approving cash advances to employees without executive approval, and on March 21, 1988, was then terminated.

Collins claims that because she would not let Henley hug her during the first four or five months of her employment at the Center, that he became angry with her and that their relationship deteriorated. Her personnel evaluations from Henley actually showed that during her initial employment at the Center, he rated her as a very

good employee (R. 469, 473). Although Collins claimed that she was working in a hostile environment at the Center, she recommended Baptist Memorial as a good place to work to both relatives and friends (Transcript, "T.", 979, 980, 981). Collins first sought legal advice when Henley began giving her reprimands in early 1988. Prior to her termination, she also called the E.E.O.C. and was advised to document the things that were happening to her. Accordingly, Collins prepared and filed various memos to her personnel file documenting her clashes with Henley at the Center. These memos were complaints by Collins primarily concerning salary matters and perceived rudeness to her on the part of Henley. Collins also documented her rebuttal to the reprimands that she received on February 15, 1988 and on March 11, 1988. She complained of her lack of authority in her position and that Henley always needed to blame someone. She complained that she was the scapegoat and she considered the reprimands to be personal attacks upon her. In none of the rebuttals are any claims made of sexual discrimination or misconduct on the part of Henley. However, Collins did observe Henley to touch and hug various employees and patients at the Center and she considered these touchings to be offensive.

In late 1987 and early 1988, the Trustees of the Center began to receive numerous anonymous letters as well as telephone calls of complaint about Henley's administration of the Center as well as claims that Henley and Mary Butts ("Butts") were having an affair. There were also complaints that Henley was offensive in the way he hugged women at the Center. Butts was a 56 year old Executive Secretary and Retirement Administrator at the

Center. She was hired at the Center on September 7, 1982, as Executive Secretary to Henley and was promoted to Retirement Administrator on December 29, 1985, prior to the employment of Collins at the Center.

Prior to her termination, Collins approached a Board Member of the Center, Mr. Bill Denton ("Denton"), complaining of sexual harassment by Henley. Denton stated that the Board needed facts to work with from the people who had witnessed any improprieties and said that he could not go to the Board with simply anonymous complaints. Thereafter, Collins began gathering statements to turn over to Denton concerning various complaints. These complaints were unsigned and were delivered to Mr. Denton on March 21, 1988. These are attached to Petitioner's Brief as Appendix "F".

Denton delivered these unsigned complaints against Henley to Frank Sanders ("Sanders"), the Chairman of the Board of Trustees of the Center, on March 21, 1988. At no time did Denton tell Mr. Sanders nor Henley the name of the person who had delivered the complaints to him. In fact, there was no evidence that Henley was even aware that any complaints against him from anyone had been delivered to Sanders prior to Collins' termination. That same afternoon of March 21, 1988, however, Collins was terminated by Henley for insubordination. Sanders first learned that Collins had provided the various complaints to Denton after her termination. He met with Collins and Denton on April 5, 1988, at his office. He was told at that time by Collins that there were people who were willing to come forward and tell the Board their complaints contained in their various unsigned letters. Sanders, Chairman of the Board of Trustees, had also

received anonymous phone calls, one specific call in which a male voice used curt language suggesting that Sanders get rid of Henley. During the April 5, 1988, meeting, Collins also informed Sanders that she had retained an attorney to represent her.

A meeting of the Executive Committee of the Board of Trustees was called by Sanders on April 12, 1988, at 1:30 p.m. to deal with the anonymous allegations that the Board had been receiving, both over the phones and through the mail. Collins was given the opportunity to appear and bring anyone who wanted to voice a complaint against Henley or the Center and to speak to the Board Members. Collins was informed on April 5, 1988, that Henley would also have the right to be present. On April 12, 1988, the meeting of the Executive Committee and the Board of Trustees was held to discuss the many anonymous letters and telephone calls regarding the character and capability of the Executive Director, Henley. However, Collins and any witnesses who had any complaint failed to appear. As a result, there was no one to substantiate the accusations.

Continuing to build a case after her termination, Collins proceeded initially with the E.E.O.C., and obtained the right to sue and did sue the Center and Henley on January 17, 1989. Trial proceeded in San Angelo, Texas, on April 9 through 13, 1990, with the Title VII matters being tried to the District Court. The various state law issues including her claims of wrongful termination, defamation, fraud, and of violations of Article 4442c[1] were submitted to the jury. The Court and jury

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[1] Art. 4442c, Tex.Rev.Civ.Stat. Ann.; *now* Health & Safety Code §§ 242.001 – et seq. (Vernon's 1991).

heard extensive testimony from twenty-eight witnesses during the week of trial and had the opportunity to evaluate their credibility.

On May 3, 1990, the District Court signed its Order making its Findings of Fact and Conclusions of Law with regard to Collins' Federal Law claims under Title VII. The Order is attached to Appellant's Petition as Appendix "D". The non-advisory jury found against Collins on all of the issues submitted except where it found that the Center failed to exercise ordinary care in the investigating and stopping alleged instances of sexual discrimination and harassment. However, the jury responded to Question No. 6 that the Center's failure to exercise such ordinary care was not the proximate cause of damages to Collins. The jury finding clearly indicated that there was no sexual discrimination and harassment, but the jury believed that the preferred method of investigation would have been to allow Collins and her witnesses to appear before the Board without Henley being present. Regarding the Federal Law claims, the District Court entered judgment in favor of Henley and the Center. The Judgment is attached to Appellant's Petition as Appendix "C". Collins then timely appealed the District Court's Order and Judgment to the United States Court of Appeals for the Fifth Circuit. On August 2, 1991, the Fifth Circuit affirmed the District Court's Judgment with regard to the retaliation and hostile environment claims, but remanded to the District Court further findings upon the quid pro quo claim. *Collins v. Baptist Memorials Geriatric Center*, 937 F.2d 190 (5th Cir. 1991) (hereinafter *"Collins"*). On August 29, 1991, the Fifth Circuit denied Collins' Petition for Rehearing. On the same date, the District Court entered Additional Findings of Fact and

Conclusions of Law submitted by the Defendants on remand. Those Additional Findings of Fact and Conclusions of Law are now the subject of a second appeal to the Fifth Circuit.

The issues presented by the Petition for Writ of Certiorari to this Court regard the decision of the Fifth Circuit affirming the District Court's Judgment and Order in favor of the Center and Henley on the retaliation and hostile environment claims. Through the course of a week-long trial, Collins had ample opportunity to present credible evidence to support her claims. Twenty-eight fact witnesses testified during the trial and voluminous documents were admitted, principally the anonymous and/or incredulous allegations alleging Henley's and Butts' adultery, Henley's improprieties and extortion of resident's estates by coercing bequests in patient's and resident's wills and, ultimately, that her termination was wrongful because it was in retaliation of her pursuing an activity protected under Title VII. Neither the Fifth Circuit nor the District Court ignored Collins' evidence that the insubordination reasons stated by the Center and Henley for firing her was clearly pretextual; the Fifth Circuit Opinion reflects, as does the District Court Order, that Collins failed to establish a prima facie case and thoroughly failed to meet the ultimate burden of persuasion regarding her retaliation and hostile environment claims. Collins is aggrieved by the fact finders' decisions and essentially has pursued her rights through her plea to obtain a new trial. The Fifth Circuit found that the District Court did not err in its Findings of Fact nor was it persuaded that the Lower Court ignored precedential Title VII standards and burden shifting guidelines.

Respondents urge that the true essence of this Appeal is the Plaintiff's objection to the District Court's and Fifth Circuit's weight afforded to the Plaintiff's proffered evidence, rather than a misapplication of the legal standards as Petitioner suggests.

REASONS THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

I. TITLE VII AND SUPREME COURT PRECEDENT REQUIRE EMPLOYERS TO CLEARLY SET FORTH SPECIFIC LEGITIMATE REASONS FOR TERMINATING AN EMPLOYEE ONLY WHEN A CLAIMANT SUCCESSFULLY ESTABLISHES A PRIMA FACIE CASE OF DISCRIMINATION. THE FIFTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH SUCH PRECEDENT.

Title VII, 42 U.S.C. § 2000e – 2 (1964), et. seq. protects employees in the workplace from sexual harassment by making it "unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . . ". The United States Supreme Court set forth the shifting burden of proof guidelines in a discrimination lawsuit which are as follows:

> First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." . . . Third, should the

> defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pre-text for discrimination.

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253-254, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207, 215 (1981) (hereinafter "*Burdine*"). Accord, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05, 93 S.Ct. 1817, 1825, 36 L.Ed.2d 668 (1973).

Collins was terminated from her employment with the Center on March 21, 1988, for insubordination. Earlier in the same day, she had delivered a compilation of letters which alleged adultery and sexual harassment of Henley to one of the Center's Trustees, Mr. Bill Denton. Later that same day, these letters were delivered by Denton to the Chairman of the Board of Trustees of the Center, Mr. Frank Sanders. At no time prior to the delivery of these letters, nor immediately before Collins' termination, did Mr. Denton inform either Sanders or Henley of the source of the letters. As the Fifth Circuit Court of Appeals recognized, this was Collins' weakest link in her prima facie case. Nevertheless, the Court of Appeals in its review, assumed inferentially that there was some causal connection between Collins' discharge and her Title VII protected activity.

The Court of Appeals acknowledged the issue of a causal connection between Collins' opposition to Henley and her termination and stated that the burden of production was on Collins to show that "'but for' the protected activity, she would not have been subjected to the action which she claims." *Collins, supra* at 193 n.7 [citing

Jack v. Texaco Research Center, 743 F.2d 1129, 1131 (5th Cir. 1984)]. Although Texas subscribes to the "at-will" doctrine regarding employment law, and under such doctrine Henley and the Center could terminate Collins without cause, Collins has urged that Henley's termination for insubordination was a pretext and, therefore, an insufficient rebuttal. However, live testimony during the trial showed that Henley, although he could not recall the specific instance, testified that Collins had approved cash advances and payroll advances in direct conflict with his prior reprimands and instruction. As Mr. Frank Merrill ("Merrill") testified, officers would usually sign the payroll checks and business drafts when presented by a staff person with the presumption that such drafts were authorized by their superiors or supervisors. Therefore, as Merrill testified, the documentary evidence produced at trial containing his or Henley's signatures were not necessarily "authorized". Hence, it would be very difficult if not impossible to produce any documentary direct evidence which would show Collins submitting payroll checks in advance which were "unauthorized", especially when Henley had earlier revoked the authorization for advance payroll drafts.

The United States Supreme Court in *Burdine, supra* at 254-256, set forth the burden placed on an employee to present evidence of its nondiscriminatory reasons in the face of Plaintiff's prima facie showing:

> . . . the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not

> persuade the court that it was actually motivated by the proffered reasons . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity.

Regarding the sufficiency of the rebuttal, the United States Supreme Court in *Burdine, supra* 257-258, further stated, "the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by a discriminatory animus." At trial, as the Court of Appeals noted in its Opinion, Henley was unable to identify the "final thing" that prompted him to terminate Collins. *Collins, supra* at 194. At trial, Henley corroborated Merrill's testimony stating that he could not produce any specific documents or instances showing Collins' insubordination, but testified that on March 21, 1988, after some deliberation concerning Collins' lack of congeniality and their conflict of personalities stemming from her bad attitude, Henley alone decided to and then terminated Collins. The specific legitimate reasons articulated were an accumulation of her bad attitude and a general unwillingness to accept direction. Henley testified that he began noticing her attitudes changing in late

1987 and attributed her attitude and ultimately her insubordination to the fact that she was not being allowed to run the personnel office at her discretion and control. This direct evidence was sufficient to rebut Collins' prima facie case which then shifted the intermediate burden of proof back to Collins. Concerning Defendants' rebuttal, the United States Supreme Court has not required the defendant to persuade the trial court that it was actually motivated by the proffered reasons, but rather that the defendant's evidence only raised a genuine issue of fact as to whether it discriminated against the plaintiff. *Burdine, supra* at 254; see also *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978). As the Supreme Court also stated in *Burdine, supra* at 256:

> We stated in *Sweeney* that "the employer's burden is satisfied if he simply 'explains what he has done' or 'produce[s] evidence of legitimate nondiscriminatory reason.'" 439 U.S. at 25, n.2, 58 L.Ed.2d 216, 99 S.Ct. 295, quoting *id.*, at 28, 29, 58 L.Ed.2d 216, 99 S.Ct. 295 (Stephens, J., dissenting).

Although Henley was unable to cite any specific cash advances or payroll check advances which Collins issued in direct conflict with Henley's instruction, there was great volume of evidence which showed that Collins was simply unhappy because she was not allowed to run the personnel office as she saw proper. The insubordination was based upon her resentment of Henley's direction.

Collins was provided the opportunity and did present evidence attempting to show that the reasons for her termination were a mere pretext; however, the ultimate

burden of persuasion remained hers. The jury and District Court had five days of testimony and ample evidence to weigh the credibility of the key issue regarding a retaliatory motive on the part of Henley. Collins failed to meet her ultimate burden. Title VII does not require employers to specifically document instances of employee's bad attitudes, insubordination and rejection of authority, to support and justify an employee's termination, when such termination is based upon legal justification. Such requirement in itself can create a hostile work environment where the only practical purpose that such practice may serve is to preserve defensive evidence for potential Title VII lawsuits. Retaliatory motives by a discriminating employer can best be ferreted by the trier of fact. For these reasons, the Writ of Certiorari should be denied.

II. MARY COLLINS, AS AN AGGRIEVED EMPLOYEE, HAS BEEN PROVIDED ADEQUATE OPPORTUNITY TO PROVE THAT THE REASON GIVEN FOR HER FIRING WAS PRETEXTUAL BY SHOWING DIRECTLY OR INDIRECTLY THAT THE EMPLOYER'S PROFFERED EXPLANATION WAS PRETEXTUAL. THERE IS NO CONFLICT BETWEEN THE FIFTH CIRCUIT'S OPINION AND PRIOR DECISIONS OF THE SUPREME COURT AND OTHER CIRCUITS.

In *Burdine, supra,* the United States Supreme Court stated that a plaintiff may succeed in showing pretext "either directly by persuading the Court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered

explanation is unworthy of credence." *Burdine, supra* at 256. See *McDonnell Douglas Corp. v. Green, supra* at 804-805. Both forms of proving discriminatory intent were available and utilized by Collins at trial.

Throughout her petition, Collins has attempted to erode the jury's and District Court's fact finding mission and analyze it with a technocratic review of the burden shifting guidelines as announced in *Burdine*. However, the United States Supreme Court has stated that the "prima facie case method established in *McDonnell Douglas* was 'never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.'" *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. 1478, 75 L.Ed.2d 403, 410 (1983) ("Aikens"), quoting *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978).

The Fifth Circuit, in the present opinion, regarding the issue of retaliatory motive, commented on the direct and indirect (circumstantial evidence) proofs. The Fifth Circuit stated in *Collins, supra* at 194:

> In sum, the evidence produced at trial was complex, confusing and even contradictory. The resolution of the retaliatory motive issue turned largely on *credibility choices*. (emphasis added).

The Fifth Circuit did not use or apply any standard that limited Collins to prove directly that a discriminatory reason more likely motivated the employer. As Collins concedes, the "leak" conversation was direct evidence and was contradicted with opposing direct evidence. The

Fifth Circuit did not ignore the pretext evidence under the indirect method allowed by the Supreme Court. Presumably, the indirect method and pretext evidence was contradicted by direct evidence which showed that Henley had no knowledge of Collins' presumably protected activities prior to her termination. The "leak" evidence was discredited by the direct evidence which showed that Sanders did not receive the letters gathered by Collins until the afternoon immediately after her termination.

Concerning the indirect proof of the retaliatory motive urged by the Petitioner, the Fifth Circuit discussed at length the direct and circumstantial evidence regarding the Center's and Henley's proffered explanation for the termination of Collins. *Collins*, at 193-95. Henley and the Center specifically stated that Collins was terminated for insubordination, specifically for her unauthorized issuance and approval of payroll checks and cash advances. Although Henley was unable to cite specific instances of Collins' insubordination, his testimony evidenced the conflict of personalities which existed and had grown between he and Collins. These hostilities were not based upon any sexual harassment, but were due to Collins' rejection of Henley's authority. Several of the Center's witnesses testified to the nature of their relationship. Kay Wright testified that Collins had told her on March 21, 1988, "This is the day I will be fired." The Center was not required to issue three reprimands to terminate Collins. As the record reveals, Collins as an "at-will" employee could be terminated at any time for any nondiscriminatory reason. As Henley stated during his testimony, Collins was continuing to exhibit simply a bad attitude

regarding how the personnel division and/or the Center should be operated. Collins alleges that she discredited the cash advances and early paycheck issuances and labels them as "hoaxes" put forth by the Center and Henley. Obviously, neither the jury nor the District Court felt that there was any "hoax" involved. The testimony of Merrill, Henley and Sanders consistently showed that although many times the Center's checks and disbursements may have had appropriate signatures, the existence of signatures on the drafts was not necessarily evidence of authorization. Merrill's testimony regarding the conversations with Henley on the morning of Collins' termination was corroborated with Henley's testimony where the early issuance of drafts by Collins was again discussed immediately prior to her termination. The Center's and Henley's proffered explanation of the insubordination, bad attitude and non-congenial personality was substantiated and worthy of credence as the trier of fact afforded it.

In summary, Collins has attempted to distort the Fifth Circuit's decision by twisting its analysis under the burden shifting guidelines as addressed in *Burdine*. However, as previously mentioned, those guidelines were never intended to be technocratic nor rigid hurdles to distort the burden placed upon the plaintiff at trial. All of the evidence was before the District Court and the ultimate decision based upon its fact findings was left and decided by the District Court whether or not the Defendants intentionally discriminated against the Plaintiff, Collins. Collins, in effect, has requested this High Court to grant her Petition and review the case, and, in essence, requests that this Court sit as a trier of fact to re-evaluate

all the evidence submitted on the record to the Fifth Circuit Court of Appeals. The United States Supreme Court should deny Appellant's Petition, and uphold the Fifth Circuit Court of Appeals' decision where the Appellate Opinion reflects that the alternate methods of proof by Collins were available and scrutinized, and thereby affirming the District Court's judgment against Collins.

III. THE FIFTH CIRCUIT IMPOSED THE STANDARDS CONSISTENT WITH STARE DECISIS REGARDING COLLINS' PROOF THAT THE HOSTILE WORKING ENVIRONMENT AFFECTED A TERM OR CONDITION OR PRIVILEGE OF HER EMPLOYMENT. THE FIFTH CIRCUIT'S STANDARD OF PROOF DOES NOT CONFLICT WITH SUPREME COURT PRECEDENT.

In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) (*"Meritor"*), the United States Supreme Court acknowledged that *Rogers v. E.E.O.C.*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972), "was apparently the first case to recognize a cause of action based upon a discriminatory work environment." The Court in *Meritor, supra* at 66, quoted excerpts from Justice Goldberg's (Fifth Circuit) Opinion in *Rogers, supra* at 238:

> [T]he phrase 'terms, conditions or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.

> . . . One can readily envision working environment's so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers. . . .

Following the *Rogers* case, the Fifth Circuit continued to recognize psychological harm as a viable claim under the hostile work environment theory. In *Jones v. Flagship Intern.*, 793 F.2d 714 (5th Cir. 1986), that Court stated, "while an employee need not prove tangible job detriment to establish a sexual harassment claim, the absence of such detriment requires a commensurately higher showing that the sexually harassing conduct was pervasive and destructive of the working environment." *Jones, supra* at 720. However, the United States Supreme Court has also recognized and affirmed that, "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII." *Meritor, supra* at 67, citing *Rogers v. E.E.O.C., supra* at 238. Concerning the severity of the sexual harassment, the Supreme Court further went on to state that, "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' " *Meritor, supra* at 67, quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982).

The analysis of the severity or persistence of the sexual harassment at a particular workplace, sufficient to affect seriously the psychological well being of an employee, is to be determined with regard to the totality

of the circumstances. *Jones, supra* at 720; *Henson, supra* at 904.

In the present Opinion, the Fifth Circuit acknowledged its review of the pervasiveness of the alleged sexual harassment considering the totality of the circumstances, where it stated:

> At trial the weakest link in Collins' hostile environment claim became the issue of whether any physical contacts of Henley with other female employees altered a term of Collins' employment. . . . [A] claim based on psychological harm 'requires a commensurately higher showing that the sexually harassing conduct was pervasive and destructive of the working environment.'

Collins, supra at 195.

Since proof of the psychological effect upon Collins was at issue, it was necessarily her burden to show that the effect was deleterious to the entire working environment, i.e. in and among other employees. The burden of showing or producing such evidence remained on Collins, per the authority of *Rogers, Meritor,* and *Jones.* The District Court was not persuaded by Collins' evidence that any conduct of Henley had created an environment so hostile that any alleged sexual harassment affected the work ethic or environs at the Center.

Collins' evidence at trial regarding the hostile environment was far less than compelling. The jury and District Court heard all of the testimony through the five day proceeding. The trier of fact had sufficient evidence to make all reasonable inferences from direct and circumstantial evidence regarding Henley's "gropings" of

women. However, the District Court and the jury, *did not* believe Collins' allegations. The only credence the fact finders afforded her was that the Center was negligent in investigating and stopping alleged instances of sexual discrimination and harassment. See Petitioner's Appendix "E".

Collins' hostile environment claim was largely discredited by the very evidence she purports was compelling – the group of letters she gathered and delivered to the Center's Trustee. Regarding these memorandums and letters, most of them were unsigned, and those that were signed, were totally discredited by impeachment evidence at trial. See Petitioner's Appendix "F".

The Fifth Circuit Court of Appeals, the Court which first recognized hostile work environment as a viable theory of recovery under Title VII, has not departed from prior precedent. The standards it has applied in its review regarding the burden of showing reflect the mandate that a trial court should rule on the ultimate issue of discrimination based upon the totality of circumstances. These standards are consistent with the United States Supreme Court and other Circuit Courts as evidenced by the line of cases of *Rogers, Meritor, Jones, Henson*, et. seq. The Petition for Writ of Certiorari should be therefore denied.

IV. THE FIFTH CIRCUIT DID NOT ERR BY ALLOWING THE DISTRICT COURT TO ADOPT THE NON-ADVISORY JURY'S FINDINGS ON STATE LAW ISSUES AND APPLY THOSE DETERMINATIONS ON THE FEDERAL LAW ISSUES WHEN ANALYZED UNDER THE APPROPRIATE TITLE VII STANDARDS AND BURDEN-SHIFTING GUIDELINES.

Collins alleges that the District Court's adoption of a non-advisory jury's findings of fact was clear error for the reason that the District Court did not instruct the jury on the appropriate burden shifting guidelines under *Burdine*. The jury was not seated as an advisory jury for the Title VII claims. The jury was impaneled to review and decide the factual issues regarding the state law causes of action. As the Fifth Circuit noted, the District Court's ultimate findings are adequately supported by the jury's findings where the jury found that Collins was not fired for reporting acts of harassment and discrimination. Regardless of the burden shifting allocations, the ultimate burden of persuasion remained on Collins. In this regard, Collins failed. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. *Burdine, supra* at 253, citing *Board of Trustees of Keene State College, supra* at 25, n.2; also, 9 J. Wigmore, Evidence § 2489 (3rd Ed. 1940).

Collins' Petition for Writ of Certiorari goes into explicit detail to show that the state law issues presented to the jury were not parallel issues to the Title VII claims. The legal rationale justifying the specific questions is irrelevant when a court instructs a jury. The fact that the

wrongful discharge questions were premised on exceptions to the "at-will" doctrine plays no relevant part in the jury's deliberation of the Court's Charge and specific instructions. Collins alludes that jury Question No. 1 was not a parallel question to any Title VII issue.[2] However, as the Fifth Circuit analyzed, the jury was properly instructed with viable definitions regarding the state law claims. See Petitioner's Appendix "E". Collins also claims that it was error for the Fifth Circuit to allow the District Court to substitute the jury's findings of fact for those of its own, especially where the jury questions submitted allegedly were misaligned to the intricate, sensitive questions posed under Title VII. However, Collins fails to note that nowhere in the record did the District Court substitute the jury findings for those of its own. The District Court did not abdicate its fact finding obligations, rather it deferred credibility choices on the relevant parallel claims to that of the jury. This was not error. Jury Question No. 1 regarding the wrongful termination for Collins is precisely the same which might be presented to decide a Title VII retaliation issue. The instructions given to the jury and the questions themselves were sufficient enough under their clear, unequivocal meaning for the District Court to adopt as subsidiary findings of fact for which the Court of Appeals could review under the "clearly erroneous" rule of Rule 52(a) of the Federal Rules of Civil Procedure.

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[2] Question No. 1 to the jury was, "Was Mary Collins wrongfully terminated by the Center for reporting acts of harassment and discrimination?" The jury answered, "No".

Collins has great difficulty accepting that the Fifth Circuit only inferred from the jury's findings that Collins was not fired for reporting acts of harassment and discrimination. The resolution of that factual issue was not speculated by the jury nor the District Court. The Findings of Fact and Conclusions of Law entered by the District Court compelled the same result as that derived by the Fifth Circuit, that Collins was fired for legitimate, nondiscriminatory reasons. Regarding the jury foreman's question requesting the Court to define sexual harassment, the District Court responded by instructing the jury with detailed and comprehensive definitions derived from United States Supreme Court case law and E.E.O.C. regulations. See 29 C.F.R. § 1604.11(b) (1985). The instructions were not "loosely based" nor ambiguous. The instruction given outlines the essential elements of hostile work environment, quid pro quo and retaliation theories of recovery under Title VII. A copy of the District Court's supplementary instruction defining sexual harassment is attached as Respondents' Appendix "A". Furthermore, the supplemental instruction provided to the jury evidences the District Court's understanding and sensitivity to the Title VII sexual harassment definition. The burden shifting guidelines were not required to be instructed as the jury was not acting in an advisory capacity. The assertion by Collins that the Fifth Circuit erred in relying on *McKnight v. General Motors Corp.*, 908 F.2d 104, 113 (7th Cir.), *cert. denied* ___ U.S. ___, 111 S.Ct. 13076, 113 L.Ed.2d 241 (1991), in determining that a remand for further findings was not required where it was clear from the record and the jury's verdict what specific issues the jury decided. Collins discussion that the specific jury findings

may well not have been made dependent upon credibility determinations is totally absurd. The entire trial was based on credibility determinations. The jury's response to Question No. 1 did not pivot upon the jury defining what "type of reports" Collins submitted. As Petitioner's Appendix "F" shows, the reports Collins submitted all allude to alleged adultery and physical contacts of Henley at the Center. There can be no question what the jury's determination was in this regard. Their answer illustrates their choice of credibility on the issue of whether Collins was discharged because of her purported protected activity.

The District Court's and Fifth Circuit's discretion to utilize the jury as subsidiary fact finders was not abused. The assertion that the Plaintiff could have submitted Title VII definitions and burden shifting guidelines is without merit. The supplemental instruction given defining sexual harassment was based upon Title VII criteria and definitions. Collins did not object the supplemental instruction at trial, nor did the Defendants. As the United States Supreme Court stated in *Aikens, supra* at 716, 411:

> [T]he District Court must decide which party's explanation of the employer's motivation it believes. All Courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. . . . But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern 'the basic allocation of burdens and

> order of presentation of proof,' *Burdine*, 450 U.S., at 252, 67 L.Ed.2d 207, 101 S.Ct. 1089, in deciding this ultimate question.

As the fact finder of the Title VII claims, the District Court did not err in adopting the jury's findings and applying those findings to the determination of the ultimate legal issues.

V. THE FIFTH CIRCUIT DID NOT ERR IN CONDUCTING ITS PLENARY REVIEW OF THE DISTRICT COURT'S CONCLUSION THAT COLLINS DID NOT PROVE HER SEXUAL HARASSMENT CLAIMS AGAINST THE DEFENDANTS.

As the United States Supreme Court has stated, an Appellate Court can reverse a Trial Court's decision where it finds that the Trial Court's "findings of fact are clearly erroneous" as set forth in Federal Rule of Civil Procedure 52(a). *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). However, ultimate findings of fact regarding Title VII sexual harassment are subject to an Appellate Court's plenary review as such are mixed conclusions of law and fact. The Fifth Circuit Court of Appeals in its present Opinion recognized and applied the appropriate standard of review where it stated, "The district court's finding is a mixed conclusion of law and fact, subject to the independent review of this Court." *Collins, supra* at 195 n.16., citing *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19, 102 S.Ct. 1781, 1790 n.19, 72 L.Ed.2d 66 (1982); *Jordan v. Clark*, 847 F.2d 1368, 1375 n.5 (9th Cir. 1988).

Upon its plenary review, the Court of Appeals concluded that the jury was persuaded that sexual harassment did occur, crediting Collins' witnesses. However, Respondents deny that the jury answers indicate that they made any such finding. Nevertheless, as the Court of Appeals recognized, even with such finding, "not all workplace conduct that may be described as 'harassment' affects a 'term, condition or privilege' of employment within the meaning of Title VII." *Meritor, supra* at 67.

Collins urges that the independent findings submitted by the District Court evidence its misunderstanding of the law and application of the improper standards in analyzing the Title VII claim. However, Collins fails to acknowledge the sexual harassment definition and instruction which was presented to the jury, attached as Petitioner's Appendix "A". Collins did not object to such a broad definition being presented to the jury and should not be allowed to raise the issue for the first time on appeal. The Respondents' failure to object potentially jeopardized their state law defense. The only finding made by the jury and the District Court was that the Center was negligent in investigating and stopping *alleged* instances of sexual discrimination and harassment. Respondents urge, as the District Court obviously held, that the jury found that the Center was negligent in its investigation of Collins' claims, not that Collins was discharged in retaliation. Respondents disagree that the Fifth Circuit was obligated to remand this case for further findings of fact where the Fifth Circuit stated:

> "[if] it is clear from the record and the jury's verdict what the jury must have found and therefore what the District Judge, in registering

> agreement with the verdict, must also have found, a remand for explicit findings is not required, because it would add nothing to the information that the Appellate Court already has."

Collins, supra at 195 n.12.

The Fifth Circuit, in analyzing the retaliation and hostile environment claims, did not err for failing to reverse and remand for further findings under the precedential framework established by this Court. Regardless of the burden shifting guidelines announced in *Burdine* and other cases, Collins failed to meet her ultimate burden of persuasion on all issues. There is insufficient evidence to suggest that the District Court applied the erroneous standards relevant to the Title VII claims. Therefore, the United States Supreme Court should deny Petitioner's Writ of Certiorari.

CONCLUSION

As Collins fails to acknowledge, the Fifth Circuit Court of Appeals has been in the forefront of sexual discrimination law for many years. In fact, it was that Honorable Court's decision in *Rogers, supra,* which first recognized the hostile work environment theory in sexual harassment cases. The Court of Appeals and District Courts within Texas illustrate that they are fully cognizant of the Title VII guidelines and sensitivities. In that same regard, these courts recognize the basic liberties inherent in Texas' "at-will" doctrine which provides an employer the right to terminate any employee for any

cause or no cause at all. This liberty should not be restricted, save and except where such liberty invades such civil rights as those protected under Title VII. Requiring employers to fully document their personnel files regarding every aspect of employment decisions, creates an inherently suspect and hostile work environment. Employers should not be required to justify otherwise legitimate employment decisions for terminating employees such as Collins where a minority employee is discharged for insubordination stemming from her bad attitude, lack of congenial accord among employees, and total disregard of her superior's instructions; this is especially so when her animosity has no causal connection to sexual harassment and/or discrimination.

For these reasons, Respondents would respectfully request that the United States Supreme Court deny this Petition for Writ of Certiorari and affirm the Fifth Circuit's decision in favor of the Defendants in all regards.

Respectfully submitted,

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RESPONDENTS' APPENDIX "A"

(Filed Apr. 13, 1990)

Members of the Jury:

In response to your note #1, please be advised that Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

In determining whether alleged conduct constitutes sexual harassment, the Jury may look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

/s/ Sam R. Cummings
U.S. District Judge